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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL GRANADOS,

Defendant and Appellant.

F062127

(Super. Ct. Nos. F10902442 & F09906824)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Marsanne Weese, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Kane, J., and Detjen, J.

## STATEMENT OF THE CASE

On August 26, 2010, appellant, Paul Granados, was charged in a first amended information in case No. F10902442 with first degree burglary of a dwelling (Pen. Code, §§ 459, 460, subdivision (a), count one)<sup>1</sup> and receiving stolen property (§ 496, subd. (a), count two).<sup>2</sup> At the conclusion of a jury trial on August 30, 2010, Granados was convicted of both counts.

On February 23, 2011, Granados filed a motion for a new trial based on allegations of juror misconduct. The trial court denied appellant's motion on February 25, 2011, and sentenced Granados to prison for the mitigated term of two years on count one.<sup>3</sup> In case No. F09906824, the court sentenced Granados to a concurrent prison term of two years. The court granted total custody credits of 573 days in both cases. Granados contends the trial court erred in denying his motion for a new trial based on alleged juror misconduct.

## FACTS

### *Residential Burglary*

At 11:30 a.m. on April 9, 2011, Kevin Semien was standing in his front yard with his brother on Filbert Avenue in Clovis when he saw a car back up and park in his neighbor's driveway across the street. The car was an older Honda Civic with faded, gray-green paint. Someone was sitting in the passenger seat. Semien did not take his eyes off of the Honda and told his brother that something did not feel right.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

<sup>2</sup> In case No. F09906824, Granados pled guilty on January 26, 2010, to first degree residential burglary. A count alleging that Granados received stolen property was dismissed. On March 9, 2010, Granados was given a suspended sentence of two years in prison, placed on probation, and ordered to spend 90 days in county jail.

<sup>3</sup> The court stayed Granados's sentence on count two pursuant to section 654.

Semien saw someone exiting the house through the front door and approaching the Honda with things in his hands. The person was carrying a Nintendo Wii and he was not wearing a shirt. The person threw the Wii into the back seat of the Honda. The burglar got into the car, sat in the front passenger seat, and the driver exited the driveway with his tires screeching. Semien got into his car and told his brother he was going to try to get a license plate number. Semien followed the Honda. Semien lost sight of the Honda for a period of time but eventually caught up with it.

Semien followed the Honda for a few blocks. The Honda turned into the cul-de-sac of a residential neighborhood, turned around, and entered traffic onto a busy street. The driver of the Honda was trying to evade Semien. The driver of the Honda eventually pulled over to the side of the road and stopped. As Semien parked his car, the driver exited the Honda, pled with Semien not to call the police, and offered to give Semien everything they had taken from Semien's neighbor's house. Semien told the driver that he wanted everything back.

The driver of the Honda and the passenger gave Semien a television, an Xbox console, a Wii console, and some games for the two consoles. The passenger was pulling property out of the back of the Honda and handing it to the driver, who in turn gave the stolen property to Semien.

The passenger was not wearing a shirt and was the same person Semien saw exiting his neighbor's house. Semien thought the passenger was possibly of Mexican heritage. Semien noticed the passenger had a lot of tattoos. The passenger had a large tattoo that extended from under his left lower armpit down to almost his waist. Semien did not, however, positively identify Granados in court as the burglar. The two people in the Honda drove away after handing the items to Semien. Semien went back home, parked his car in his neighbor's driveway, and had his brother call the police. Semien did not touch any of the property that had been given to him. Police officers retrieved the

stolen property from Semien. Semien told the police that the passenger had multiple tattoos, including some on his neck.

Dawn Porter was the owner of the burglarized house and Semien's neighbor. On April 9, 2011, Semien called Porter at noon to report to her that her home had been burglarized. Porter examined the property recovered by Semien and now in police custody and identified it as coming from her home. Porter identified a television, an Xbox, a Wii, a camcorder, and 30 video games. The television had a 40-inch screen and Porter had purchased it only two weeks earlier.

Porter stated that there was missing jewelry, including a necklace with a diamond pendant, a necklace with Black Hills Gold that had a heart and a rose, and another Black Hills Gold necklace with a cross. Porter also discovered a handgun on her bed that did not belong to her family.

When Porter left her home that day, all of the doors and windows were closed. Although the house was clean when Porter left for the day, when she returned items were strung along the hallway, dresser drawers and jewelry boxes were opened up, and game paddles were scattered on the floor. Porter does not know Granados and did not give him permission to be in her home or to have any of her property. Porter's adult daughter, who also lived in Porter's home, did not know Granados and did not give him permission to be in the home or to take any property.

Clovis Police Officer Curtis Shurtliff was dispatched to investigate the burglary of Porter's residence. When Shurtliff arrived to Porter's home, he found the front door open. The screen to the front kitchen window was on the ground and the window was opened. Other officers dusted the residence and retrieved property for fingerprints. The inside of Porter's home had been ransacked. The beds were disheveled, things were falling out of closets, video games were in the living room that had been pulled from

cabinets. A jewelry box was sitting on a dresser. The gun that Porter identified as not belonging to her was a replica Ruger BB pellet gun.

Community Service Officer Ty Wood lifted a fingerprint from the right side of the television set and transferred it to a fingerprint card. The card was brought to the Clovis Police Department where it was booked into evidence and analyzed by a fingerprint analyst. Fingerprint analyst Terry Fetters testified that she examined the latent fingerprint collected by Wood on the card and it matched the rolled fingerprint impression of Granados's left index finger.

The defense recalled Officer Shurtliff who testified that Semien was adamant that the shirtless suspect was Asian, but initially went back and forth as to whether the suspect was Asian or Hispanic. Shurtliff wrote in his police report that Semien described the suspect as Asian. Semien described the suspect as having tattoos on his sides, his left arm, and his abdomen. The suspect also had short black hair. Wood was recalled by the defense and testified that he retrieved two fingerprint cards from the television set.

### ***Motion For New Trial***

Granados's motion for a new trial included the allegations of juror 35 that during jury deliberations a juror said Granados must be guilty because he has tattoos. "A reference was made" to Granados having long sleeves to cover other tattoos. "It was indicated" that Granados was probably a gang member because he had a teardrop tattoo near his eye, which meant he either killed someone or knows someone who killed someone. "Another juror" made a statement that because Granados was in court, he must have done something. Three or four votes were taken before juror 35 felt pressured to change her vote to guilty.

The prosecution submitted the declaration of Juror 13 who stated that during jury deliberation there was discussion of the defendant's tattoos when the jury was discussing the issue of identification of the defendant. Juror 13 stated there was no discussion the

defendant was guilty solely because he had tattoos, or that the defendant was a gang member because he had tattoos.

At the hearing on the motion for a new trial, defense counsel argued that there were statements heard by the jurors that constituted juror misconduct. Defense counsel asserted that the statements were inherently prejudicial because of the extreme nature of the comments made about Granados's tattoos. Defense counsel submitted the matter without requesting the testimony of members of the jury in an evidentiary hearing.

Citing *People v. Danks* (2004) 32 Cal.4th 269 (*Danks*), the trial court noted that jurors rely on their everyday experience in assessing the guilt or innocence of a defendant and the jury does not have to operate in a completely sterilized environment free of any external factors. The court noted that the defense motion referred to juror comments about tattoos and there was some evidence at trial with respect to tattoos. The court observed that looking at Granados, one can see that he has tattoos. The court was hardpressed to find that commentary on tattoos constituted misconduct.

The court agreed that the comments attributed to other jurors by Juror 35 were not complimentary, but it was not clear to the court that the comments constituted misconduct. The court found that Juror 35's comments concerning the voting process by the jury was clearly inadmissible under Evidence Code section 1150 as it states the mental processes of the deliberation process. The court found the remaining statements in Juror 35's declaration as not being "probative of much of anything." The court also held that to the extent the allegations of juror statements by Juror 35 are deemed to be misconduct, there is not a substantial likelihood of juror bias under the totality of the circumstances. The court found no prejudice and denied the motion for a new trial.

## DISCUSSION

Granados contends the trial court erred in denying his motion for a new trial because the prosecution failed to demonstrate that the jury misconduct did not prejudice him. We disagree and affirm the judgment.

In impeaching a jury's verdict, Evidence Code section 1150, subdivision (a), distinguishes between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which cannot be corroborated or disproved. The only proper influences that may be proved under the statute to impeach the verdict are those open to sight, hearing, and other senses that are subject to corroboration. (*Danks, supra*, 32 Cal.4th at p. 302.) Here, the trial court correctly ruled that Juror 35's references to the pressure she felt to reach a guilty verdict and her other thought processes were inadmissible under Evidence Code section 1150, subdivision (a) and will not, therefore, be considered in our analysis.

Misconduct by a juror, or a nonjuror's tampering communication with a sitting juror, raises a rebuttable presumption of prejudice. The jury system is fundamentally human. Jurors bring to their deliberations knowledge and beliefs about matters of law and fact based on their lives and experiences. This is both a strength and weakness of the jury system; it has the potential to undermine determinations that should be made exclusively on the evidence and trial court's instructions. It is a weakness, however, that must be tolerated. It is an impossible standard to require the jury to be a laboratory, completely sterilized from external factors. (*Danks, supra*, 32 Cal.4th at p. 302.)

If on appeal we find there was misconduct, we consider whether the misconduct was prejudicial. When misconduct involves the receipt of information from extraneous sources, the effect is judged by a review of the entire record. It may be found to be nonprejudicial. The verdict is set aside only if there appears a substantial likelihood of

juror bias. Such bias can appear in two different ways. (*Danks, supra*, 32 Cal.4th at p. 303.)

First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced a juror or the jury. A finding of “inherently” likely bias is required only when the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would warrant reversal of the judgment. (*Danks, supra*, 32 Cal.4th at p. 303.) Application of this “inherent prejudice” test depends upon a review of the trial record to determine the prejudicial effect of the extraneous information. (*Ibid.*)

Second, under the circumstantial test (*In re Carpenter* (1995) 9 Cal.4th 634, 654 (*Carpenter*)), even if the extraneous information was not so prejudicial, in and of itself, as to create inherent bias under the first test, the nature of the misconduct and the totality of the circumstances surrounding the misconduct must be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose. (*Danks, supra*, 32 Cal.4th at p. 303). Actual bias occurs where a juror cannot put aside his or her impressions or opinions based upon the extrajudicial information he or she received and to render a verdict based solely upon the evidence received at trial. (*People v. Nesler* (1997) 16 Cal.4th 561, 582-583.)

Under this second test, the presumption of prejudice may nevertheless be rebutted, inter alia, by a reviewing court’s determination, upon examining the entire record, that there is no substantial likelihood the defendant suffered actual bias. (*Danks, supra*, 32 Cal.4th at p. 303.)

In applying the circumstantial test to a case involving extraneous information, “the ‘entire record’ logically bearing on a circumstantial finding of likely bias includes the nature of the juror’s conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial,



and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict.” (*Carpenter, supra*, 9 Cal.4th at p. 654.)

Applying these principles to the instant action, we agree with the trial court that observations by jurors that appellant had tattoos was a factual issue that required resolution by the jury. Because Semien did not directly identify Granados at trial as the shirtless suspect, the question of Granados’s tattoos was relevant to identifying him as the burglar of the Porter residence. It was not inherently prejudicial or unfair for jurors to note that appellant had a tattoo on his neck, or even that he may have been covering other tattoos on his arms during trial by wearing long shirt sleeves.

Juror 35’s statement that she heard a fellow juror say that Granados must be guilty because he had tattoos would still not constitute misconduct if the statement was made in the context of establishing Granados’s identity as the shirtless suspect. Juror 13’s declaration states unequivocally that Granados’s tattoos were referred to in deliberations when the jury was discussing the factual issue of Granados’s identification. Likewise, Juror 35’s statement that a juror said Granados must be guilty because he was in court must be viewed objectively in the context of the jury’s entire deliberative process and its ultimate conclusion that Granados was the perpetrator of the Porter residence burglary. Assuming *arguendo* that these statements by Juror 35 and Juror 13 are both true, we find no misconduct in the context of a jury evaluating a defendant’s guilt or innocence during its deliberations.

Thus, each statement of alleged misconduct attributed by Juror 35 was either inadmissible under Evidence Code section 1150, or did not rise to jury misconduct when viewed in context. Juror 35 further alleged, however, that “[i]t was indicated” that a teardrop tattoo near Granados’s eye meant he belonged to a gang, killed someone, or knew someone who killed someone. This was the most problematic statement attributed

to another juror by Juror 35. For the purposes of our analysis, we will assume this statement constituted misconduct, even though it was refuted in Juror 13's declaration.<sup>4</sup>

Viewing the record as a whole, we conclude that this was not a weak case even though Semien failed to positively identify Granados as the burglar at trial. Semien retrieved some of the stolen property from Granados and his accomplice after following their car. One of the items retrieved was a flat screen television that had Granados's fingerprint on it. This was very strong evidence that the shirtless man with tattoos that Semien saw exit the Porter residence with property was indeed Granados. Because the prosecution's case was strong on the question of Granados's identity and culpability, we find it less likely that the alleged extraneous information concerning Granados's tattoos influenced the verdict. (*Carpenter, supra*, 9 Cal.4th at p. 654.)

A passing reference to an inappropriate matter is generally not prejudicial. Where jury misconduct is not inherently likely to have affected the vote of any of the jurors, prejudice is not shown. (*People v. Hord* (1993) 15 Cal.App.4th 711, 727.) We find Juror 35's alleged statements concerning Granados's tattoos as indicating gang membership and the meaning of a teardrop tattoo to be passing references to inappropriate matters that were not inherently likely to affect the vote of any jurors in the instant action. Any presumption of prejudice to the defendant by the alleged misconduct has been rebutted.

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<sup>4</sup> Respondent alternatively argues that because the prosecution submitted the declaration of Juror 13 refuting the statements in Juror 35's declaration, the court should have conducted a hearing pursuant to *People v. Hedgecock* (1990) 51 Cal.3d 395, 419. A trial court can conduct such a hearing where there is a strong possibility of juror misconduct and there is a material conflict that needs to be resolved by an evidentiary hearing. A *Hedgecock* hearing, however, need not be conducted in every case in which jury misconduct is alleged. (*Ibid.*) The trial court's finding that there was no prejudice to Granados, even if jury misconduct occurred, is supported by the record and did not necessitate a *Hedgecock* hearing in this case.

(*People v. Tafoya* (2007) 42 Cal.4th 147, 193.) The trial court did not err in ruling that even if there was juror misconduct in this case, Granados suffered no prejudice.

**DISPOSITION**

The judgment is affirmed.